THE NEW YORK WORKMEN'S COMPENSATION ACT DECISION

On March 24, 1911, in the case of *Ives* v. *South Buffalo Railway Company,* 201 N.Y. 271, 94 N.E. 431, the New York Court of Appeals unanimously held the recent Workmen's Compensation Act of that state (the so-called "Wainwright Act") to be in violation of the New York constitution. The act applied to workmen engaged in manual or mechanical labor in eight specified employments, classified by the act as especially dangerous on account of the risks of physical injury inherent in work therein. These included the more important building operations, railroading, tunneling, and work in connection with electricity or explosives. Accidents causing personal injuries to workmen in the specified employments, due wholly or partly to necessary or inherent risks of the employment or to the employer's lack of care or violation of law therein, were to be compensated, unless caused wholly or partly by the serious and wilful misconduct of the workman. The scale of compensation was fixed with reference to the workman's actual daily earnings at the time of injury and to the dependence of others upon his earnings, with a maximum payment of $3,000 for death and $10 a week for eight years for disability. In no case was the compensation to exceed the damage suffered. Injured workmen were given an option to sue under this act, or under the previous law of the state.

The principal arguments against the validity of the statute seem to have been: (*a*) that the employer's defenses could not be abrogated under the "fellow-servant" rule, the law of "contributory negligence," and the doctrine of "assumption of risk" by the employee; (*b*) that the classification of dangerous employments was arbitrary and unreasonable, in deprivation of the "equal protection of the laws"; (*c*) that the procedural sections of the act perhaps deprived the employer of a jury trial upon the question of the amount of his liability; and (*d*) that the absolute

liability imposed upon the employer when not himself at fault deprived him of property without "due process of law."

The court conceded that the defenses of fellow-service and contributory negligence could be entirely abolished, and that of assumption of risk greatly modified, without constitutional invalidity. It also decided that the classification of employments was reasonable. The jury trial objection was left undecided, on account of conflicting views of the members of the court. The decision was placed upon ground (*d*), under the New York state constitution, the similar prohibition in the Fourteenth Amendment of the federal Constitution being expressly left unconstrued (201 N.Y. at 317; 94 N.E. at 448).

In discussing the court's decision, it may be said at the outset that the act as a whole very imperfectly realized the hopes and ideas of those who have thought most carefully upon the subject, and that its overthrow may prove a blessing in the end, if, through constitutional amendment, other defects than those declared by the court may be remedied. Particularly unfortunate provisions were those giving the injured plaintiff, after his injury, an option to sue upon the employer's present liability, and providing that actions in disputes under the act "shall be conducted in the same manner as actions at law for the recovery of damages for negligence." Other provisions of the New York constitution forbidding a legislative limitation of liability for wrongfully causing death, and requiring jury trial "in all cases in which it has been heretofore used" doubtless account for these defects; but if the state constitution is to be amended to meet the present adverse decision, as is apparently proposed, the amendment should also authorize a limited liability in all cases and the dispensing with jury trials in disputes arising under the act. Otherwise the economic waste involved in preparing for and conducting litigation under the old rules of liability and procedure cannot be eliminated.

At the beginning of its opinion, the court, by Judge Werner, summarizes the arguments for the law from the report of the Wainwright Commission to the legislature, and proceeds:

This quoted summary of the report of the commission to the legislature, which clearly and fairly epitomizes what is more fully set forth in the body of the report, is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally, and legally unsound. Under our form of government, however, courts must regard all economic, philosophical, and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be molded into statutes without infringing upon the letter or spirit of our written constitutions. In that respect we are unlike any of the countries whose industrial laws are referred to as models for our guidance. Practically all of these countries are so-called constitutional monarchies in which, as in England, there is no written constitution, and the Parliament or lawmaking body is supreme. In our country the federal and state constitutions are the charters which demark the extent and the limitations of legislative power; and while it is true that the rigidity of a written constitution may at times prove to be a hindrance to the march of progress, yet more often its stability protects the people against the frequent and violent fluctuations of that which, for want of a better name, we call "public opinion."

After holding the law void as depriving the employer of property without due process of law, the court again says:

In arriving at this conclusion we do not overlook the cogent economic and sociological arguments which are urged in support of the statute. There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances, or tools; that, under our present system, the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific, and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interests of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment; but we think it is an appeal which must be made to the people, and not to the courts. The right of property rests, not upon philosophical or scientific speculations, nor upon the commendable impulses of benevolence or charity, nor yet upon the dictates of natural justice. The right has its foundation in the fundamental law. That

can be changed by the people, but not by legislatures. In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval; but courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided.

Elsewhere in the opinion it is conceded that reform in this branch of jurisprudence is devoutly to be wished, and nowhere is it suggested that the method adopted by the act is arbitrary or unreasonable. The gist of the objection is that—

> When our constitutions were adopted it was the law of the land that no man who was without fault or negligence could be held liable in damages for injuries sustained by another,

and the reversal of this rule by the Compensation Act is so revolutionary a change as not to afford due process of law.

Even if it were true that under the common-law system there had been few or no previous instances of liability without fault, it would by no means follow that the creation of such a liability would necessarily be a taking of property without due process, provided it were not arbitrary, but were a reasonable method of securing a rationally conceived public end. To hold that the characteristic of long-accustomed usage

> is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians. . . . . These broad and general maxims of liberty and justice . . . . applied in England only as guards against executive usurpation and tyranny, here . . . . have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property (*Hurtado* v. *California*, 110 U.S. 516, 529, 532).

Legislation approved by the experience of practically all civilized industrial countries except the United States as greatly diminishing the admitted evils, injustice, and waste of our present system of dealing with industrial accidents, cannot with good reason be condemned as violating "broad and general maxims of liberty and justice" intended as "bulwarks against arbitrary legislation." The economic and social grounds for upholding

such legislation seem so abundantly established that no argument can make them clearer.

One may, then, briefly discuss the purely legal ground upon which the court essays to sustain its decision—that heretofore, in our system of law, liability without fault has been so exceptional that any systematic attempt to introduce it as a principle in large classes of cases, even where it substantially remedies admitted evils, is not permissible.

In the first place, it is to be noted that for 250 years after Magna Charta, to the language of which our American "due process" clauses are clearly traceable, it was the law of England that one was liable to those injured by his acts or by the acts of persons and things for which he was responsible, whether the injury was due to the defendant's fault or not. The first reported suggestion that freedom from fault might excuse in such cases was made in 1466, and it was not until 1891 that this as a general rule became fully settled in England. In America there were dicta and decisions to this effect from 1820 on, the important decisions being between 1830 and 1850. Even the non-statutory law upon this point, however, has been subject to numerous exceptions. Carriers and innkeepers (not protected by special contract) are liable for goods destroyed without their fault; the possessors of animals must keep them from straying at their peril; the husband was absolutely liable for the torts of his wife and the master for those of his servant (within the scope of his authority), no matter how carefully the servant was selected and instructed; the person who had custody of a fire was liable for its spread, regardless of fault (until the rule was altered by statute); those who keep dangerous explosives do so at their peril; the ship is liable for the care of sick and injured sailors; persons who conduct blasting operations do so at their peril as regards trespasses caused thereby; one who digs in his land is absolutely liable for changes thus caused in the surface of a neighbor's land, no matter how unforeseeable; a landowner must keep his land free from nuisances, even those created there by strangers against his will and without his fault; in some jurisdictions one who brings on his land and keeps there anything likely to escape and do damage (like a reservoir of water) is

liable therefor, even though the escape be without his fault; and one who diverts the flow of surface water may be held liable if, even without his fault, his neighbor is flooded thereby. In addition to the above, which, as regards the defendant, are all in principle cases of accidental injury without fault, there is the great class of injuries caused by mistake, without fault, as where one meddles with the person or property of another, reasonably and in good faith thinking he has a right to do so, when he has not. No fault of any kind can be imputed to the defendant, but he is everywhere held liable.

Statutes, too, have not infrequently imposed liabilities without fault. Owners of dogs have been made absolutely liable for damages done by them; drivers of cattle have been made liable for injuries to roads; railroads have been made liable for the unavoidable escape of fire; it has been said carriers could be made absolutely liable for injuries to passengers arising from the operation of railroads; and banks have been compelled to contribute toward each other's losses. Several state courts have held unconstitutional laws making railways absolutely liable for stock killed on the track, but a contrary view of this is apparently held by the United States Supreme Court. Similar in principle seem to be the important classes of cases where persons are liable who, though wholly without fault, fail to avoid some condition or result penalized by the law. Instances are statutes absolutely requiring milk offered for sale to meet a certain test, or railroads to have their car couplings in a safe condition. It is no defense that a cow's milk unforeseeably falls below the test, or that a coupling unexpectedly becomes disabled between stations.

In the face of so large a number of instances of liability without fault under our system of law, it cannot be successfully argued that a statute takes property without due process of law merely because it imposes a new liability of this character. The question instead must be the more fundamental one: Does the statute seek an end so unreasonable or arbitrary as not to be within the legislative discretion? or, Has it sought a legitimate end by similarly unreasonable or arbitrary means? If these questions are answered in the negative, and the statute violates no definite or historically well-settled principles of private right,

it should be held to be due process. In the light of human experience during the past generation throughout the civilized industrial world, can a statute be said to be unreasonable or arbitrary that places upon the person conducting a hazardous business the risk of personal injury to those employed in it? By a system of insurance this risk, like those from fire, will at once be spread over the whole industry, added to the cost of its product, and borne by society, which also gets the benefit from the industry and its hazards.

Some of the illustrations used by the New York court in argument, if meant in full seriousness, show a failure to appreciate the principle of the statute. For instance, the court says:

> If the legislature can say to an employer, "You must compensate your employee for an injury not caused by you or by your fault," why can it not go farther and say to the man of wealth, "You have more property than you need and your neighbor is so poor that he can barely subsist; in the interest of natural justice you must divide with your neighbor so that he and his dependents shall not become a charge upon the state"?

And Chief Justice Cullen suggests that a law might as well compel a man to pay his neighbor's debts as to shift to him the risk of injury to men employed in his hazardous employment. The difference between making a business bear its own inherent risks, and making well-to-do persons divide their property with the needy generally or assume their debts is sufficiently obvious even to the lay mind, and the use of such illustrations sensibly weakens an opinion already unconvincing.

It is impossible to believe that this decision will stand as the final interpretation of "due process of law" in American constitutions applicable to workingmen's compensation acts. As the United States Supreme Court said in 1898 regarding the meaning of this constitutional provision,

> In view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and particularly the new relations between employers and employees, as they arise (*Holden* v. *Hardy*, 169 U.S. 366, 387).

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